PEGUAM NEGARA HONG KONG

v.

LORRAIN ESME OSMAN & 2 ORS.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HAJI ABU MANSOR BIN ALI J.
[ORIGINATING SUMMONS NO. R1-24-58 OF 1991]
11 JULY 1994

BANKING: Applicants bank officers - Applicants requested to give evidence in Hong Kong and Malaysia - Prohibition against disclosure of information under s. 97(1) of BAFIA 1989 - Whether disclosure by bank officers an offence under BAFIA 1989 or breach of duty of confidentiality under the common law - Whether an order of Court pursuant to s.6 of the Banker's Books (Evidence) Act provides an exemption against the offence or breach - Consideration of ss. 97(2) & 100 of BAFIA 1989 - Order 66 RHC 1980.

This was an application by two bank officers of Bank Bumiputra Malaysia Berhad (the Bank), who were requested to give evidence in Malaysia and Hong Kong, for orders in relation to, *inter alia*, the question of whether the disclosure of information by the applicants would amount to an offence under s. 97(1) of the Banking and Financial Institution Act 1989 (BAFIA) or a breach of their duty of confidentiality under the common law and whether an order of Court pursuant to s. 6 of the Banker's Books (Evidence) Act (BBEA) dated 4 March 1992 would provide an exemption to the applicants against the offence or breach.

The parties agreed that; in the absence of an order under s. 6 of the BBEA, it was an offence under s. 97(1) of BAFIA and a breach of the duty of confidentiality under the common law for the applicant witnesses to give evidence in Hong Kong and Malaysia and further that once an order was made under s. 6 of the BBEA, the provisions of s. 97(1) and the duty of confidentiality under the common law would not apply. Thus the only question required to be answered by the Court was whether an order pursuant to s. 6 of the BBEA would provide exemption to the applicants when giving evidence in Hong Kong.

The Counsel for the applicants submitted that the exemption provided by s. 6 of the BBEA would only apply, if the witness gives evidence in Malaysia but not if evidence is given in Hong Kong. Counsel for the 2nd respondent argued that all the documents and evidence had been read and disclosed in Court and was therefore no longer secret but was in the public domain. In reply, Counsel for the applicants submitted that the applicants were still bound to observe the prohibition of s. 97(1) as all the evidence sought to be disclosed or already disclosed was from the Bank and any exemption under s. 97(2) of BAFIA could only apply when the source of the information was from one other than the licensed institution. He also submitted that the difficulty was in determining factually whether such information had already been in the public domain and not disclosed by the Bank. The Counsel for the 1st respondent submitted that as far as the scope of the orders made under the BBEA was concerned, the Malaysian Court did not have the jurisdiction to make the order purporting to have extra territorial effect because this Court would not have sovereignty beyond its frontiers but if a witness were to first give evidence in Malaysia and then proceeded to Hong Kong to give further evidence there, that would not constitute an offence under the BBEA provided there was absolute compliance with the Court order here. With respect to the evidence being in the public domain, he submitted that an order pursuant to s. 6 of the BBEA once given; overrides the provision of BAFIA and in particular s. 100 would override s. 97 of BAFIA. He further submitted that the evidence was already available to the public and that if a witness gives such evidence in the witness box pursuant to a Court order, in reality the Court is the source.

Held:

[1] The Court found merit in the argument of the applicant's Counsel that the protection given by s. 6 of the BBEA and s. 97(2) and s. 100 of BAFIA would only be available to the witness if

they give their evidence in the High Court in Malaysia in compliance with the Court's order under s. 6 of the BBEA. They would not have the protection of the Court if they voluntarily agreed and did give evidence in Hong Kong, not even in compliance with a Court order in Malaysia and they were to continue with that evidence in Hong Kong; for the order giving them that protection can only operate within the territorial limits of the Court's jurisdiction. The Court based its decision on the case of *In re State of Norway's Application (No. 2)* [1989] 458 HL.

[2] The intention of Parliament is clear. The records or evidence to be divulged are Malaysia's. It was plain that the task of determining that BAFIA is not breached could only fall on the shoulders of the Courts in Malaysia. The applicants were therefore not exempted by order of Court under s. 6 of BBEA from the prohibition under s. 97(1) of BAFIA and from breaching their duty of confidentiality when giving evidence in Hong Kong.

[Applicant's question answered in the negative. Each party to bear their own costs].

Cases referred to:
Attorney General v. Guardian Newspapers Ltd. & Ors. (No. 2) and related appeals [1988] 3 All ER 545 ***(refd)***
In re State of Norway's Application (No. 2) [1989] House of Lords 458 ***(foll)***
In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (Nos. 1 & 2) [1978] AC 547 ***(refd)***

Legislation referred to:
Banker's Books (Evidence) Act 1949, s. 6
Banking and Financial Institutions Act 1989, ss. 97(1), (2), (3), 100
Rules of the High Court 1980, O. 66

For the applicant - S. Suhendran; M/s. Saheran & Woon
For the 1st respondent - Graham Campbell Grant (Ira Biswas with him); M/s. Chooi & Co.
For the 2nd respondent - Sir Michael Ogden (B.E. Teh with him); M/s. Teh & Associates

JUDGMENT

Haji Abu Mansor Bin Ali J:
The applicants herein are applicant witnesses (1) Zauyah Wan Chik and (2) Lai Ming Kong who are officers of Bank Bumiputra Malaysia Berhad. In the applicants' application dated 6 May 1994 enclosure (7) they applied for orders as follows:

1. As to giving evidence in Hong Kong:

   (a) whether the disclosure by the officers of any document or information falling within the prohibition as set out in s. 97(1) of the Banking and Financial Institutions Act 1989 ("BAFIA") during the course of giving evidence at the trial of the third defendant in Hong Kong, will constitute an offence under BAFIA or will cause the bank and/or the officers to breach any other obligation of confidentiality imposed upon the officers or the bank under common law;

   (b) whether the order made by this Honourable Court pursuant to the Banker's Books Evidence Act ("the BBEA") dated 4 March 1992, will exempt the officers and/or the bank from committing an offence under s. 97(1) of BAFIA or from breaching any other obligation of confidentiality in event of the disclosure of information or documents in the circumstances described in 1.(a) above;

   (c) if the answer to 1.(b) above is in the affirmative, whether the protection afforded by the order of this Honourable Court pursuant to the BBEA dated 4 March 1992 will only exempt the bank or the officers from breaching their obligation of confidentiality under s. 97(1) of BAFIA or under common law, with respect to the disclosure of information or documents relating to the areas set out in the said order only;

2. As to the taking of evidence in Malaysia:

   (a) whether the evidence of the officers to be recorded by this Honourable Court in these proceedings pursuant to letter of request issued by the Hong Kong Supreme Court

("the letter of request"), the orders of this Honourable Court dated 25 September 1991 and 4 March 1992, by way of examination-in-chief, cross-examination or otherwise, is to be limited or confined to the areas set out in the letter of request and/or the said orders only;

(b) whether the protection afforded by the order of this Honourable Court made under the BBEA dated 4 March 1992 will only exempt the bank or the officers from breaching their obligations of confidentiality under s. 97(1) of BAFIA or under common law, with respect to the disclosure of information or documents relating to the matters set out in the said order only;

3. that provision be made for the costs of this application.

As the question that has been framed by the applicant is so wide and difficult for me to answer, I requested if parties could somehow resolve the issues and the applicant and the parties have so resolved and on 10 May 1994 they came up as follows:

(a) We are all agreed that in the absence of an order made under s. 6 of the Banker's Books (Evidence) Act (BBEA), it is an offence under s. 97(1) of the Banking and Financial Institutions Act and a breach of the duties of confidentiality under common law for the applicant witnesses to give evidence in Hong Kong or in Malaysia.

(b) Subject to para (i) and (ii) below which define the issues between the parties, we are all agreed that once an order is made under s. 6 of the BBEA, the provisions of s. 97(1) and the duties of confidentiality under common law do not apply:

(i) Whether an order made by this Court pursuant to s. 6 of the BBEA exempts the applicant witnesses from committing any offence under s. 97(1) or breaching their duties of confidentiality when giving evidence in Hong Kong; and

(ii) If applicant witnesses give their evidence in Malaysia is their evidence to be restricted solely to what is contained in the letters of request, the orders made under O. 66 or the order made pursuant to s. 6 of the BBEA.

After hearing some lengthy argument by Mr. Suhendran who appeared for the applicant and the bank, I raised the question that if the question as resolved is answered by the Court and then the two witnesses finally decided that they are not willing to go and give evidence in Hong Kong, the Court's order would be an exercise in futility as the witnesses are not compellable. The Court therefore insisted that they be present in Court to be personally questioned and to give their answers as to their stand as to the giving of the evidence in Hong Kong.

The two witnesses kindly appeared without any difficulty on 11 May 1994 and they told the Court if they are wanted to give evidence in Hong Kong and their bank want them to do so, they would willingly do so as requested though they understand and are aware that they could not be compelled to do by the Court in Hong Kong and that the only impediment to their doing so in Hong Kong is whether they would be committing an offence if they do so and would they be able to get the Court's protection having done so? I was then satisfied that this Court's order would not be futile if we were to proceed to hear the further argument. However, Mr. Suhendran's path was further thwarted by matter posed by the Court.

In question (b)(ii) that had been posed, I asked parties if the question to be answered may not embrace or fit all circumstances that had yet to arise and the Court would be in the position of having to anticipate the circumstances. This Court had also previously answered questions relating to relevancy and materiality of the evidence, in the course of this proceedings and it had decided that such questions are to be the function of the trial Judge hearing the case in Hong Kong though this Court was obliged to record any objection and could even express its opinion on that evidence.

On hearing the Court's comment on issue in (b)(ii) and the Court's observation that the Court would actually deal with the question as it arises rather than anticipate at this stage, Mr. Suhendran has kindly agreed only to further proceed with the argument and confine himself

to arguing only question posed in (b)(i) and he was satisfied that he could raise it when it arises and the Court will deal with it specifically.

From here on it was agreed by the parties that the only question needed to be answered by the Court was in respect of (b)(i) which as stated earlier was:

(i) Whether an order made by this Court pursuant to s. 6 of the Bankers' Books (Evidence) Act exempts the applicant witnesses from committing any offence under s. 97(1) or breaching their duties of confidentiality when giving evidence in Hong Kong.

Section 6 of the Act is as follows:

> An officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a Judge made for special cause.

Mr. Suhendran submitted that the exemption given by complying with s. 6 of the Bankers' Books (Evidence) Act would only apply, if the witness gives that evidence in Malaysia. Put in another way he says the exemption will not apply to protect the witnesses when the officers give evidence in Hong Kong in the proceedings there. Counsel referred the Court to the actual order at p. 67 of enclosure (7) dated 4 March 1992. Counsel further submitted that it cannot be denied that that order relates to the taking of evidence in Malaysia and that the order was also ancillary to an order under O. 66 High Court Rules - the Order of Eusoff Chin J., as he then was. He further elaborated that the order was for exemption in the examination to be conducted by a High Court Judge. In short he said the order under the Bankers' Books (Evidence) Act was to allow the witnessses, the protection of and also under s. 100 of the Banking and Financial Institutions Act from the prohibition under s. 97 of this latter Act.

Counsel submitted further that the protection given by this Act cannot be availed by these witnesses by voluntarily giving evidence in Hong Kong. If they go to Hong Kong to give the required evidence, they could be committing an offence and breach the common law duty of confidentiality. He submitted that the order once given, the exemption comes into play, but only as regards the giving of evidence in Malaysia.

Mr. Suhendran then proceeded to submit a reply in anticipation of Sir Michael Ogden's submission found in paragraphs 8 and 9 of R. 177 wherein Sir Michael Ogden argued that all the documents and evidence had been read and disclosed in Court and therefore, in the public domain and therefore would no longer be secret and the Court, therefore, will not prevent their publication.

Mr. Suhendran submitted that while the above may be the common law view there exist a statutory prohibition in the form of s. 97 of the Act which reads thus:

97. Secrecy

(1) No director or officer of any licensed institution, whether during his tenure of office, or during his employment, or thereafter, and no person who for any reason, has by any means access to any record, book, register, correspondence, or other document whatsoever, or material, relating to the affairs or, in particular, the account, of any particular customer of the institution, shall give, produce, divulge, reveal, publish or otherwise disclose, to any person, or make a record for any person, of any information or document whatsoever relating to the affairs or account of such customer.

(2) This section shall not apply to any information or document which at the time of the disclosure is, or has already been made, lawfully available to the public from any source other than the licensed institution, or to any information which is in the form of a summary or collection of information set out in such manner as does not enable information relating to any particular licensed institution or any particular customer of the licensed institution to be ascertained from it.

(3) No person who has any information or document which to his knowledge has been disclosed in contravention of subsection (1) shall in any manner howsoever disclose the same to any other person.

a And the exemption under s. 97(2) can only apply when the source of such information is from other than the licensed institution.

Mr. Suhendran's submission was to the effect, I stand corrected, that all the evidence sought to be disclosed including the ones already disclosed are all information which had their source from the bank and because the disclosure, is the licensed institution, the bank, s. 97(2) protection will not apply to them and by virtue the witnesses are still bound to observe the prohibition of b s. 97(1). Being so bound and even though they have the exemption under s. 6 of the Bankers' Books (Evidence) Act order that will only cover their evidence here in Malaysia and not their evidence in Hong Kong. The witnesses' position is further aggravated by the fact the evidence and documents to be given for example by Zauyah Wan Chik cannot for sure be said clearly to have been disclosed and read in Open Court as she had never given evidence before. He further reiterated even though the documents had been disclosed to investigators such as Clifford Allison, it does not mean that such information are already in the public domain. The c information had been disclosed subject to their undertaking not to disclose them for any purpose other than for the purpose of these proceedings. If evidence is given in Hong Kong by them for example no one can be sure if that evidence might not be wider than what would be allowed by the order.

Mr. Suhendran also submitted the difficulty would appear to be the work of determining factually whether such information had already been in public domain and not disclosed by the d bank so as to bring it within the ambit of the protection under s. 97(1) of the Banking and Financial Institutions Act.

Mr. Grant for the Hong Kong Attorney-General supports and endorses the argument and submission of Mr. Suhendran that the prohibition runs even though the document is with the public and had their source from the bank. Mr. Grant kindly took the Court to several sections of the Banking and Financial Institutions Act and how strict its applications are and there are e provided also penal provisions in the event of its or their breach but they can only relate to proceedings in Malaysia.

Mr. Grant submitted further that as far as the scope of the orders made under the Bankers' Books (Evidence) Act is concerned, the position of the Attorney-General Hong Kong are as follows:

f (a) The Malaysian Court does not have the jurisdiction to make the order purporting to have extra territorial effect because this Court will not have sovereignty beyond its frontiers. Just as the witnesses cannot be compelled by Hong Kong Court to give evidence there likewise this Court could not compel them to give evidence in Hong Kong.

While this was the Attorney-General Hong Kong's stand as to the Court's jurisdiction but, if I understand Mr. Grant, his submission on this is slightly different. He submitted that not every act can be covered but if a witness were to first give evidence here in Malaysia and the witness g then proceed to Hong Kong and further give evidence there that does not constitute an offence under the Bankers' Books (Evidence) Act provided there is absolute compliance with the Court order here and the witness give testimony and produce documents there that also does not constitute an offence under the Banking and Financial Institutions Act. In such circumstances the giving of the same evidence there in Hong Kong is covered by the Bankers' Books (Evidence) Act. Other than this he, endorsed and adopted the applicant's view. Mr. Grant addressed the h Court at length further than s. 97 of the Banking and Financial Institutions Act but as this Court is only obliged to answer the question posed, I do not propose to refer to them.

Then as regards the submission that the documents yet to be produced are already in the public domain on a factual basis, he said they are not documents that are in the public domain in the common law sense. In this regard only part of "CHA-1" and "CHA-2" were read in England during the course of the protracted *Habeas Corpus* proceedings, we believe documents "CHA-3" were material to the proceedings. He admitted that while Zauyah Wan Chik's "CHA-2" and i "CHA-3" documents some may have been produced but not all have been so.

On Sir Michael's part he submitted that this matter arose because the bank decided to get advice. He relied on the celebrated case of *Attorney General v. Guardian Newspapers Ltd. & Ors. (No. 2) and related appeals* [1988] 3 All ER 545 where it was held that the Court would not grant an injunction restraining the publication of confidential information acquired by a Crown servant in the course of his employment by the Crown if it could be shown that publication of the information would not be contrary to the public interest.

He submitted that s. 6 of the Bankers' Books (Evidence) Act order once given overrides the provision of Banking and Financial Institutions Act in particular s. 100 of the latter Act override s. 97 of that Act. He posed further the question if after the issue of an order, the witness can give evidence in Hong Kong or the witness is obliged to give evidence in Hong Kong? He answered why not. He submitted that there are good reasons why that evidence is desirable as no Court will do anything to diminish the prospect of a fair trial. He said if the jury could not hear the witness, it would work against a fair trial. In this case the two witnesses had already indicated they are prepared and are willing to go and there is no reason why not. He submitted that if the Court accepts his submission then there is no need for the Court to consider s. 97(2) of the Banking and Financial Institutions Act.

He submitted that the evidence was already available to the public and as to the source he submitted that if a witness gives such evidence in the witness box pursuant to a Court order in reality, the Court is the source in accordance with the direction of the Court. The question was whether or not the documents had been so produced, some witness must speak of that document.

Having considered this application and the arguments of all parties, I say, with respect, I find merit in the argument of Mr. Suhendran that the protection given by s. 6 of the Bankers' Books (Evidence) Act and s. 97(2) and s. 100 of the Banking and Financial Institutions Act would only be available to the witnesses if they give their evidence in our High Court here in Malaysia in compliance with the Court's order under s. 6 of the earlier Act. I rule they would not have the protection of the Court if they voluntarily agree and do give evidence in Hong Kong. I say this, not even in pursuant and in compliance with a Court order here and they were to continue with that evidence in Hong Kong for the order that gives them that protection can only operate within the territorial limits of the Court's jurisdiction not extra territorial. I base my decision on the case in *In re State of Norway's Application*. *In re State of Norway's Application (No. 2)* [1989] House of Lords 458, where the State of Norway applied to have the evidence of two witnesses, in the jurisdiction of the English Court recorded, the first application of the Norway State was initially rejected because the request was too wide but when they applied a second time, with detailed questions on specific matters that application was granted by the English Court. Lord Goff of Chieveley approving *In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (Nos. 1 and 2)* [1978] AC 547 at 565 favourably quoted the words of Diplock at page 633:

> ... The jurisdiction of English Courts to order persons within (their) jurisdiction to provide oral or documentary evidence in aid of proceedings in foreign Courts has always been exclusively statutory ...

Then at pages 469 and 470 of this *In re State of Norway's Application's* case, His Lordship said:

> ... the argument advanced on behalf of the witnesses would involve a profound departure from the established legal practice of conferring a very broad jurisdiction upon the Courts in the United Kingdom to enable them to provide assistance for Courts in other jurisdictions by obtaining evidence for them ...

I would add and emphasise the purpose of the whole exercise is for the purpose of "obtaining evidence for them" with all the inbuilt conditions such as to be found in our s. 97(2) of the Banking and Financial Institutions Act clearly specified by Parliament when such evidence, if improperly given can become an offence. The intention of Parliament is I think clear. The records or evidence to be divulged are Malaysia's. It is plain to me that the task of determining that the Act is not breached can only fall on the shoulders of Courts in Malaysia. I would therefore answer Mr. Suhendran's poser in (b)(i) in the negative, with each party to bear their own costs.